BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALAN RAY CUMMINGS	)	
Claimant	)	
	)	
VS.	)	
	)	
TAYLOR FORGE ENGINEERED INC.	)	
Respondent	)	Docket No. 247,175 &
	)	264,665
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the November 21, 2003 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on May 4, 2004.

APPEARANCES

Robert V. Wells of Kansas City, Missouri, appeared for the claimant. Tracy M. Vetter of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a scheduled 25 percent permanent partial disability to the right shoulder in Docket No. 247,175 and a scheduled 20 percent permanent partial disability to the left shoulder in Docket No. 264,665.

The claimant requests review of the nature and extent of disability. Claimant argues that he sustained injury to his left shoulder and elbow as well as his right shoulder on June 4, 1998, and consequently is entitled to a whole body disability. Claimant further

argues that his restrictions coupled with the fact that he takes narcotic medication for pain due to both shoulder injuries as well as his left elbow injury have rendered him permanently and totally disabled. With regard to the August 30, 2000 accident involving the left shoulder, claimant argues he is entitled to a 39 percent functional impairment to the shoulder.

Conversely, respondent requests the Board to affirm the ALJ's Award in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Docket No. 247,175

In Docket No. 247,175 claimant suffered injury to his right shoulder on June 4, 1998, as a machine he was adjusting with a wrench suddenly started. When the machine started it caused an extreme hyperabduction and external rotation of the claimant's right shoulder. Respondent does not dispute that claimant suffered accidental injury to his right shoulder as a result of this work accident.

As claimant continued to work while receiving treatment for the right shoulder injury he alleges that he began to experience pain in his left elbow as well as his left shoulder because of overuse from favoring his right shoulder. Respondent denies claimant suffered such alleged injuries to his left elbow and left shoulder.

After the June 4, 1998 accident the claimant went to his personal physician and was prescribed anti-inflammatory medication. Claimant continued performing his regular job duties as a machinist.

Claimant, with respondent's approval, was referred on June 24, 1998, to Dr. John C. Clohisy for examination and treatment. Dr. Clohisy diagnosed claimant with a right shoulder anterior impingement. The doctor gave claimant a subacromial steroid injection and referred the claimant for physical therapy. The doctor placed claimant on light duty with limited use of his right upper extremity, specifically prohibiting heavy lifting or overhead activities.

Claimant continued to perform his regular job duties but noted that he used his left arm more and was provided assistance as needed. As claimant continued working he noted that his left elbow began to be painful, he had difficultly closing his left hand and he also began to experience some pain in his left shoulder.

On August 19, 1998, Dr. Clohisy noted he was leaving the practice and referred claimant to Dr. Brian C. Kindred. Dr. Clohisy ordered an arthrogram to determine if claimant had a rotator cuff tear. The arthrogram confirmed claimant had a complete tear of the right rotator cuff. On September 18, 1998, Dr. Kindred performed surgery on claimant consisting of a right rotator cuff repair with acromioplasty. During recovery from this procedure, the claimant developed significant adhesive capsulitis which, on March 4, 1999, required the right shoulder to be manipulated while claimant was under anesthesia.

In July 1999, claimant returned to light-duty work for respondent which consisted of microfilming old bills during claimant's eight-hour work day.

Because of ongoing right shoulder pain the claimant was referred to Dr. Lowry Jones Jr. Dr. Jones examined claimant on August 18, 1999, and noted claimant's continuing complaints of right shoulder pain as well as a complaint of increasing pain in the left elbow from using his left arm repetitively since his return to work. The doctor noted that the pain in the left elbow was consistent with lateral epicondylitis and appeared to be from overuse syndrome. The doctor further noted that consideration should be given to limiting claimant's repetitive use of his left upper extremity to prevent development of severe lateral epicondylitis. The doctor also ordered an MRI of claimant's right shoulder.

On September 15, 1999, claimant returned to Dr. Jones and was told the MRI revealed a partial tear of the right rotator cuff. Surgery was scheduled to repair the shoulder. Because of claimant's persistent pain in the left elbow, which the doctor noted was from repetitive use and reaching, the doctor injected the left lateral epicondyle region of the elbow.

On October 1, 1999, Dr. Jones performed arthroscopic surgery on claimant's right shoulder which consisted of debridement of adhesions, synovium and articular cartilage. On October 25, 1999, claimant returned to light-duty work for respondent. Claimant returned to the job microfilming old bills.

Dr. Jones concluded claimant was at maximum medical improvement on February 14, 2000. Dr. Jones imposed permanent restrictions against lifting more than 50 pounds to the waist. In addition, the doctor restricted claimant from lifting more than 20 pounds to the level of the chest and a maximum of 10 pounds for an overhead lift with no repetitive lifting above the shoulder. The doctor noted the claimant's carrying capacity for the right arm was limited to 40 pounds. Finally, the doctor restricted claimant from repetitive reaching, pushing or pulling with the right upper extremity.

At his attorney's request, the claimant was examined by Dr. P. Brent Koprivica on February 22, 2000. Claimant complained of right shoulder pain as well as left elbow pain. The doctor opined claimant suffered chronic left lateral epicondylitis which was a direct and natural consequence of the right shoulder injury with subsequent overuse of the left extremity while performing work activities for respondent. The doctor opined claimant

suffered a 10 percent permanent functional impairment to the left upper extremity due to the lateral epicondylitis of the left elbow. The doctor noted that converts to a 6 percent functional impairment to the whole body. The doctor further opined claimant suffered a 38 percent functional impairment to the right shoulder which converts to a 23 percent functional impairment to the whole body. Combining the two whole body impairments results in a 28 percent functional impairment to the whole body.

On March 1, 2000, claimant went to Southland Family Medicine Center with complaints of continuing right shoulder pain as well as left elbow pain. On April 28, 2000, the claimant sought treatment from Dr. Mark B. Chaplick and the Pain Clinic Nursing Documentation on that date noted continuing pain complaints in the left elbow.

Claimant continued performing light-duty work until a plant wide layoff occurred in June through part of July 2000. Claimant was recalled to work the last week of July 2000 and initially returned to microfilming old bills. As some point that job was completed and claimant was returned to the plant performing a job within his restrictions as a helper. Claimant described the helper job as essentially getting materials such as gaskets and tools for the machine operator and doing cleanup. Claimant noted that his right shoulder and left elbow pain remained about the same.

On August 30, 2000, while performing the light-duty one-handed work as a machinist's helper, the claimant tripped on a pallet and caught himself with his left arm as he fell. Claimant experienced immediate pain in his left arm.[1]

On October 27, 2000, claimant was laid off and has not returned to work for respondent.

Dr. Jones had opined claimant suffered a 21 percent functional impairment at the level of the right shoulder. In a November 20, 2000 letter to claimant's counsel, the doctor noted that after he had injected claimant's left elbow, he had seen claimant on six additional occasions and claimant had not made any further elbow complaints. Consequently, the doctor noted that, in the absence of evidence of claimant complaining of additional pain or problems with lateral epicondylitis, he did not believe claimant suffered any impairment to his elbow.

After the August 30, 2000, injury the claimant was ultimately referred to Dr. McPherson Scott Beall Jr., a board certified orthopedic surgeon. Dr. Beall examined claimant on August 30, 2001, primarily for his left shoulder complaints and concluded that no further treatment was warranted. On March 21, 2002, the doctor examined claimant and opined that claimant had a 20 percent functional impairment to the left upper extremity at the shoulder, a 25 percent functional impairment to the right upper extremity at the

[1] This accident is the subject of Docket No. 264,665.

shoulder and a 7 percent functional impairment of the left elbow. The doctor noted the combined 52 percent functional impairments to the upper extremities converts to a 31 percent functional impairment to the whole body. The doctor imposed permanent restrictions of weight lifting of 20 pounds and no climbing or activities above chest level with either arm.

At his attorney's request, the claimant was again examined by Dr. Koprivica on May 31, 2002. The doctor again opined that claimant suffered a 38 percent right upper extremity impairment at shoulder level and a 10 percent functional impairment for left lateral epicondylitis. In addition, due to overuse as well as the August 30, 2000 accident the doctor opined claimant had suffered a 39 percent functional impairment to the left upper extremity at the shoulder level. The doctor concluded the upper extremity impairments converted and combined for a 44 percent functional impairment to the whole body. The doctor imposed restrictions for claimant to avoid any above shoulder activities with either upper extremity. The doctor further restricted claimant to 20 pounds or less for lifting up to the chest and noted claimant should avoid forceful pushing, pulling as well as wrist dorsiflexion activities with the left upper extremity. Lastly, the doctor recommended claimant do no climbing activities.

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries as a result of his work-related accident on June 4, 1998, and his work activities afterwards. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.[2] It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.[3] If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered a scheduled disability.[4] The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.[5]

Dr. Koprivica opined that claimant had developed lateral epicondylitis in his left elbow from overuse while the right shoulder was being treated. While treatment primarily focused upon claimant's right shoulder, nonetheless, claimant complained of left elbow pain which Dr. Jones diagnosed as lateral epicondylitis from overuse and treated with an injection. After being released from treatment by Dr. Jones, the claimant sought additional

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[2] K.S.A. 44-510d; K.S.A. 44-510e.

[3] *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

[4] K.S.A. 44-510d(a)(13).

[5] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

treatment and on two separate occasions continued to complain of elbow pain. Finally, when presented with a hypothetical question detailing claimant's one handed work with the left upper extremity while the right shoulder was treated, the Dr. Beall agreed that it was probable that some of the permanent impairment claimant suffered in his left elbow was caused or aggravated by the overuse of that extremity.[6]

It is well determined in workers' compensation litigation that a scheduled injury may evolve into a general disability through the subsequent occurrence of direct and natural consequences.[7]

Additionally, when a primary injury under the Workers' Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is the direct and natural result of the primary injury.[8]

In this instance, it is not disputed that claimant suffered accidental injury to his right shoulder on June 4, 1998, while employed with respondent. Thereafter, while receiving treatment for that shoulder injury the claimant was forced to utilize only his left upper extremity while he continued working. Claimant then developed problems with his left upper extremity, specifically lateral epicondylitis of his elbow. This problem was a natural consequence of the right upper extremity injury. Both Drs. Koprivica and Beall found claimant suffered permanent injury to his left upper extremity.

The Board acknowledges Dr. Jones disagrees with this finding, but notes that his opinion was based upon a lack of continued elbow complaints. The medical records indicate claimant continued to have such complaints after he was released from treatment by Dr. Jones. The Board, therefore, finds that claimant has suffered an injury to his bilateral upper extremities arising out of and in the course of his employment with respondent and claimant's award in Docket No. 247,175 should be based upon a whole body impairment.

Claimant argues that as a result of his injuries he is permanently and totally disabled. The Board disagrees. Although Dr. Koprivica offered an opinion that claimant was realistically unemployable, he nonetheless, also offered an opinion regarding claimant's task loss. Likewise, Michael J. Dreiling, claimant's vocational expert, concluded that claimant was not realistically employable, but on cross-examination Mr. Dreiling agreed that he was not stating that claimant cannot do any type of work. Conversely, Richard Santner, respondent's vocational expert, offered the opinion that claimant retained

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[6] Beall Depo. at 19.

[7] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

the ability to engage in substantial gainful employment. And claimant agreed that on occasion he would operate a backhoe, a tractor or deliver mail for a friend.

As the ALJ noted, the ability to drive a backhoe or tractor is inconsistent with claimant's assertions that he cannot operate machinery. Moreover, claimant submitted a list where he had applied for employment and argued that he had made a good faith effort to find employment. This shows claimant must have believed he could do those jobs. The Board concludes that the greater weight of evidence indicates claimant retains the ability to perform light-duty work and is not permanently and totally disabled.

Accordingly, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

The Kansas Court of Appeals in *Watson*[12] more recently held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[13]

Claimant provided a list of prospective employers where he had applied for employment. After claimant last worked for respondent on October 27, 2000, he only applied for work with nine prospective employers. The Board concludes claimant has failed to prove he has made a good faith effort to find work in the open labor market. Consequently, the law requires the Board to impute a post-injury wage.

Respondent's vocational expert, Mr. Santner, offered an opinion that claimant could earn a salary teaching welding at a vocational school. It should be noted that it appears that teaching welding would require claimant to engage in physical activity proscribed by his permanent restrictions. Mr. Santner further concluded that if claimant did not teach he nonetheless retained the ability to earn $7-10 per hour which would average $340 per week. The Board concludes that the latter is more persuasive evidence of claimant's wage earning ability. When compared with claimant's gross average weekly wage of $638.08 the claimant has suffered a 47 percent wage loss.

Dr. Koprivica, utilizing the task list of claimant's former work tasks prepared by claimant's vocational expert Mr. Dreiling, opined that claimant's restrictions prevent him from performing 12 of 17 tasks for a 71 percent task loss. Averaging claimant's 47 percent

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[11] Id. at 320.

[12] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[13] Id. at Syl. ¶ 4.

wage loss with his 71 percent task loss yields a 59 percent permanent partial general disability. Accordingly, the Board modifies the ALJ's Award to reflect claimant suffered a whole body impairment and is entitled to a 59 percent permanent partial general disability.

Docket No. 264,665

In Docket No. 264,665 claimant alleged injury to his left shoulder as a result of tripping over a pallet at work on August 30, 2000. Claimant sought treatment with his physician Dr. Ryan Wood on September 18, 2000. Dr. Wood referred claimant to Dr. Gregory P. Lynch who evaluated the claimant on October 11, 2000. The doctor ordered an MRI which the doctor stated revealed a partial tear of the rotator cuff as well as evidence of impingement. Dr. Lynch initially treated claimant with physical therapy and subacromial steroid injections. Ultimately, Dr. Lynch recommended arthroscopic surgery.

Claimant was referred to Dr. Beall, a board certified orthopedic surgeon, for a second opinion. Dr. Beall examined claimant on August 30, 2001, primarily for his left shoulder complaints and concluded that no further treatment was warranted. On March 21, 2002, the doctor again examined claimant and opined that claimant had a 20 percent functional impairment to the left upper extremity at the shoulder.

At his attorney's request, the claimant was again examined by Dr. Koprivica on May 31, 2002. The doctor opined that due to overuse of the left upper extremity after the June 1998 work accident and due to the August 30, 2000 accident the claimant had suffered a 39 percent functional impairment to the left upper extremity at the shoulder level. On February 12, 2003, the doctor apportioned the left upper extremity impairment and attributed 15 percent to the injury claimant suffered in the fall at work on August 30, 2000.

Dr. Koprivica concluded that claimant had suffered an overuse injury to the left shoulder after the June 4, 1998 work injury to his right shoulder. But the medical records fail to corroborate that assertion. Although claimant did complain to the doctors of left elbow pain, there were not corresponding complaints of left shoulder pain. The left shoulder complaints were made to the health care providers after claimant suffered the August 30, 2000 fall at work.

Accordingly, the Board finds more persuasive Dr. Beall's opinion that claimant has suffered a 20 percent functional impairment to the left shoulder as a result of the August 30, 2000 work accident. Accordingly, the Board affirms the ALJ's Award in Docket No. 264,665 in all respects.

AWARD IN DOCKET NO 247,175

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 21, 2003, is modified to reflect claimant

suffered a whole body impairment and is entitled to a 59 percent permanent partial general disability award.

The claimant is entitled to 48.69 weeks of temporary total disability compensation at the rate of $351 per week or $17,091.56 followed by 224.97 weeks of permanent partial disability compensation at the rate of $351 per week or $78,964.47 for a 59% work disability, making a total award of $96,056.03 which is due, owing and ordered paid in one lump sum less amounts previously paid.

AWARD IN DOCKET NO 264,665

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 21, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2004.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Robert V. Wells, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director